Libel Per Se and Libel Per Quod in Ohio

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The question has often arisen in Ohio as to whether words used by the defendant are libelous *per se* or libelous *per quod*. The answer to this question is important because of the view Ohio courts have taken regarding libel actions, particularly in regard to the requirement of special damages.

In England and in many American courts all libelous words are actionable *per se, i.e.*, it is not necessary for the plaintiff to prove special damages, malice, or falsity, all these being presumed from the speaking of the words.[1] Not all slander, however, is actionable *per se*. Unless the words charge the plaintiff with an indictable offense (involving moral turpitude or infamous punishment), a loathsome disease, or are calculated to injure him in his trade or profession, he must show the words caused him specific, pecuniary loss in order to recover.[2] Thus there are many words actionable *per se* if written which require allegation and proof of special damages if merely spoken.

All courts make a distinction between written words which are clearly defamatory on their face and those which are ambiguous, capable of either an innocent or a defamatory meaning, or defamatory only in light of extrinsic facts or circumstances.[3] Words in the first class are referred to as libelous *per se*: words in the latter class are referred to as libelous *per quod*. If the words are in the latter class the plaintiff must allege the defamatory meaning of the words by an innuendo, and if they are defamatory only in light of

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[1] Cassidy v. Daily Mirror Newspapers, [1929] 2 K.B. 331, 69 A.L.R. 720. There appears to be some argument over whether the majority or only a minority of American courts hold all libel actionable without special damages. See PROSSER, TORTS § 92 (1941); MCCORMICK, DAMAGES § 113 (1935); 33 AM. JUR., LIBEL AND SLANDER § § 5, 243.

[2] Davis v. Brown, 27 Ohio St. 326 (1875). In Sexton v. Todd, Wright 316 (1833), it was held slanderous *per se* to impute unchastity of a woman. To do such is also a crime in Ohio. OHIO REV. CODE § 2901.37. Without going into the subject very deeply, special damages must be pecuniary in nature, alleged with particularity, and arise through and from a lowered reputation due to the defamatory publication. They must be due to conduct of someone other than the defamer or defamed and be a proximate result (in the legal sense) of the defamatory words. See Bigelow v. Brumley, 138 Ohio St. 574, 594, 37 N.E. 2d 584, 594 (1941); Peabody v. Barham, 52 Cal. App. 2d 581, 126 P. 2d 668 (1942); Terwilliger v. Wands, 17 N.Y. 54, 72 Am. Dec. 420 (1858); RESTATEMENT, TORTS § 575 (1938); MCCORMICK, DAMAGES § § 113, 114, 115 (1935).

[3] 33 AM. JUR., LIBEL AND SLANDER § 5.

extrinsic facts or circumstances these too must be set out in an inducement.[4] Suppose the allegedly libelous words published by the defendant accuse the plaintiff of marrying his own aunt. If this charge is understood by its recipients as meaning plaintiff married his consanguineal aunt then it has carried a defamatory meaning. If it is understood that plaintiff's wife was his aunt only by her former marriage then the meaning conveyed was not defamatory but innocent. The words are capable of either an innocent or a defamatory meaning. Plaintiff must allege by innuendo that the words charged him with marrying his consanguineal aunt; the words were not libelous *per se* but libelous *per quod*.[5] Suppose again that a newspaper prints that the plaintiff has given birth to twins. There is nothing defamatory about this statement until an extrinsic fact is introduced, namely, that the plaintiff has been married only one month. Plaintiff must allege this fact and that the recipients of the publication had knowledge of the fact and thus derived a meaning from the publication defamatory of the plaintiff.[6] This would be done by inducement and innuendo. These two examples illustrate libel *per quod* as most courts define it, to be distinguished from a case of libel *per se* where the charge is clearly libelous on its face.

Since most courts regard all libels as actionable without a showing of special damages it does not matter, except from the procedural standpoint, whether the defamatory words are libel *per se* or *per quod*. Some courts, however, recognize a substantive difference between the two, requiring allegation and proof of special damages in case the words are libelous *per quod*.[7] Ohio cases have repeatedly held that a petition based on words libelous *per quod* without an allegation of special damages is subject to demurrer.[8] Since special damages must be shown in cases of libel *per quod* in Ohio, it becomes important to determine what our courts mean by the terms libel *per se* and libel *per quod*.

An examination of the Ohio cases leads one to the conclusion that there are two tests often employed to determine the differ-

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[4] OHIO REV. CODE § 2739.01 does not eliminate the need for an inducement in such a case. Druck v. Kahle, 6 Ohio L. Rep. 648 (1909).

[5] Peabody v. Barham, 52 Cal. App. 2d 581, 126 P. 2d 668 (1942).

[6] See Morrison v. John Ritchie & Co., 39 Scottish L.R. 432, 4 Session Cases 645 (1902).

[7] Peabody v. Barham, 52 Cal. App. 2d 581, 126 P. 2d 668 (1942); Towles v. Travelers Ins. Co., 282 Ky. 147, 137 S.W. 2d 1110 (1940); Rowan v. Gazette Printing Co., 74 Mont. 326, 239 Pac. 1035 (1925). See note 1, *supra*.

[8] *E.g.*, Bigelow v. Brumley, 138 Ohio St. 574, 37 N.E. 2d 584 (1941); Sweeney v. Beacon Journal Publishing Co., 66 Ohio App. 475, 35 N.E. 2d 471 (1941); Fares v. Vindicator Printing Co., 29 Ohio L. Abs. 452 (1939); Barteck v. Personal Finance Co., 60 Ohio App. 197, 20 N.E. 2d 259 (1939); Peer v. Hoiles, 3 Ohio L. Abs. 653 (1925) no facts stated; Cleveland Retail Grocers' Assn. v. Exton, 18 Ohio Cir. Ct. 321, 10 Ohio Cir. Dec. 145 (1899).

ence between libel *per se* and libel *per quod*. The two tests are not at all similar and although usually the court uses one, ignoring the other, sometimes it will try to use both tests and it becomes quite confusing. The first test might well be called the "nature of the charge" test as it determines whether the charge is libelous *per se* or *per quod* depending upon what the defendant has imputed to the plaintiff by the words. This test looks at the nature of the defendant's charge and does not depend upon whether the charge is carried on the face of the words or is hidden behind them. The second test used is the one used by most courts elsewhere and might be called the "need for an innuendo" test. This test, discussed earlier, requires that the defamatory meaning be carried on the face of the words and without any need for an innuendo or inducement in order to be libelous *per se*.

Nature of the Charge Test

As stated before, this test determines what words are libelous *per se* on the basis of the seriousness of the act or conduct charged to the plaintiff and the harm such a charge is calculated to bring the plaintiff. It appears to be the test more often applied and should be made clear by a few quotations from leading cases.

> A libel in reference to individual injury may be defined to be a false and malicious publication against an individual, either in print or in writing, or by pictures, with intent to injure his reputation, and expose him to public hatred, contempt, or ridicule.... Words of *ridicule* only, or of contempt, which merely tend to lessen a man in public esteem, or to wound his feelings, will support a suit for libel, because of their being embodied in a more permanent and enduring form; of the increased deliberation and malignity of their publication, and of their tendency to provoke breaches of the public peace.[9]
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> A libel is a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent toward government, magistrates, or individuals. It does not necessarily charge the plaintiff with a crime, for if its design be wanton and malicious ridicule, and the tendency of the publication to hold up the plaintiff to the scoffs and sneers of society; to degrade him and lessen his standing, an action may well be sustained. So, likewise, if its tendency will naturally excite to passion and revenge, and consequent breaches of the peace.[10]
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> ... although the matter published might not, without averment and proof of special damage, be actionable, if only spoken, yet if published, and it be of a character, which, if believed, would naturally tend to expose the person concerning whom the same was published, to public

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[9] Watson v. Trask, 6 Ohio 531, 532 (1834); *see* Newbraugh v. Curry, Wright 47 (1832).

[10] Tappan v. Wilson, 7 Ohio 190, 193 (1835).

> hatred, contempt, or ridicule, or deprive him of the benefits of public confidence or social intercourse, such publication is a libel, and an action will lie therefor although no special damage is alleged.[11]
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> ... words written or printed and published, imputing to another any act, the tendency of which is to disgrace him, or to deprive him of the confidence and good will of society, or lessen its esteem for him, are actionable *per se* ....[12]
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> To constitute a publication respecting a person *libelous per se*, it must appear that the publication reflects upon the character of such person by bringing him into ridicule, hatred or contempt, or affects him injuriously in his trade or profession.[13]

These somewhat broad definitions of libel *per se* might have been trimmed down a bit in some later court of appeals cases. In the case of *Sweeny v. The Beacon Journal Publishing Co.*,[14] the court held words charging the plaintiff, a United States Congressman, with blocking the appointment of a United States attorney to federal court on the basis that the latter was a foreign born Jew were not libelous *per se*. The court said in order for words to be libelous *per se* they must charge the plaintiff with a violation of the law of the land or the moral code, and that these words did not charge any such violation. Although this limitation may be a wise one in view of the fact that no legal fault is required on the part of the defendant as far as intent to defame is concerned, there was little authority for the proposition to be found in our supreme court cases. It must be admitted, however, that in many of the cases in which the supreme court had held words libelous *per se* as subjecting the plaintiff to hatred, ridicule, or contempt, they consisted of charges almost all persons would regard as violations of the moral code.[15] The limitation, if finally approved by the supreme court, should not cover those charges which are calculated to injure one in his business or profession, because it is quite defamatory to write of a merchant that he is insolvent[16] and yet it

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[11] State v. Smily, 37 Ohio St. 30, 33 (1881).

[12] *Id.* at 34.

[13] Cleveland Leader Printing Co. v. Nethersole, 84 Ohio St. 118, 95 N.E. 735, Ann. Cas. 1912B 978 (1911).

[14] 66 Ohio App. 475, 35 N.E. 2d 471 (1941). See also Holloway v. Scripps Publishing Co., 11 Ohio App. 226 (1919); Ohio Public Service Co. v. Myers, 54 Ohio App. 40, 6 N.E. 2d 29 (1934).

[15] *E.g.*, Newbraugh v. Curry, Wright 47 (1832) perjury; Watson v. Trask, 6 Ohio 531 (1834) wilful patent infringement; Dial v. Holter, 6 Ohio St. 228 (1856) crime of removing corner stone; State v. Smily, 37 Ohio St. 30 (1881) larceny or receiving stolen goods; Mauk v. Brundage, 68 Ohio St. 89, 67 N.E. 152, 62 L.R.A. 477 (1903) careless child delivery by doctor. This list is far from being complete.

[16] See Myerson v. Hurlbut, 98 F. 2d 232 (D. C. Cir. 1938). In G. M. McKel-

certainly is not immoral or illegal to become financially embarrassed. The court did not so intend to extend the limitation but confined it to those words which subject the plaintiff to ridicule, hatred, or contempt.

It is to be noted that in all these definitions of libel *per se* the court is concerned with the nature of the charge. Nowhere do they seem to require that the charge be on the face of the words. In fact the court often says if the charge is ambiguous it is the court's function to determine if it is capable of a defamatory meaning and the jury's function to determine if the defamatory meaning was the one conveyed.[17] One case has specifically stated that it was the jury's duty to determine if the ambiguous and two-headed charge was libelous *per se*.[18] Likewise, this test allows the plaintiff to establish that words are libelous *per se* even when it is necessary to allege extrinsic facts or circumstances to show the defamatory meaning conveyed by the words.[19] Therefore the use of the innuendo or inducement does not prevent words from being libelous *per se*.

The result of this test is to put Ohio in accord with the view that nothing more than a procedural distinction is made between words clearly defamatory on their face and those capable of two meanings or defamatory only in light of extrinsic facts. Broadly stated, those words which subject the plaintiff to hatred, contempt, or ridicule, or are calculated to injure him in his trade or profession, are actionable without a showing of special damages whether the defamatory meaning is carried on their face or is hidden.

But what does this leave for the action of libel *per quod*? The court has said words libelous *per quod* are actionable upon a showing of special damages. Does this mean those words which subject the plaintiff to hatred, contempt, or ridicule and yet do not meet the more rigid test of the *Sweeny* case? Probably not, because the action was recognized before this limitation was devised. What it must mean is that any words which are false and actuated by malice are actionable if they cause the plaintiff special, pecuniary damage. It is not necessary that the words be defamatory at all

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vey Co. v. Nanson, 5 Ohio App. 73 (1915), the court held it was not libel *per se* to print that plaintiff, a tailor, had suddenly retired from business.

[17] Westropp v. E. W. Scripps Co., 148 Ohio St. 365, 74 N.E. 2d 340 (1947); State v. Smily, 37 Ohio St. 30 (1881); Culmer v. Canby, 101 Fed. 195 (6th Cir. 1900); Westropp v. E. W. Scripps Co., 76 Ohio App. 463, 59 N.E. 2d 205 (1944); Foster v. Fesler, 25 Ohio Cir. Ct., N.S., 449 (1916); Bishop v. Cincinnati Gazette Co., 7 Ohio Dec. Repr. 711 (1880) *aff'd* 6 Ohio Dec. Repr. 1113 (1882).

[18] Westropp v. E. W. Scripps Co., 76 Ohio App. 463, 59 N.E. 2d 205 (1944).

[19] See Bigelow v. Brumley, 138 Ohio St. 574, 593, 37 N.E. 2d 584, 594 (1941).

within the usual meaning of the term, because if they are defamatory, namely, if they subject the plaintiff to ridicule, hatred, or contempt, they are actionable *per se*. And yet we have seen that the requirement of special damages is that the loss must come from a lowering of the reputation. Therefore it follows the words must have been of the type which lowered the plaintiff's reputation, and if they are, then they should be actionable *per se*. It is possible that the usual definition of special damage may have to be changed for this somewhat strange action of libel *per quod*, as the present meaning of special damage was designed for slanderous words not amounting to slander *per se* but still defamatory in nature.

Under this "nature of the charge" test the court seems to be saying that an action will lie for words non-defamatory in nature which cause the plaintiff special damage and that this action should be called libel *per quod*. It may well be that an action should lie for false and malicious words which cause the plaintiff damage, but it is confusing to call the action libel *per quod*. The court seems to be talking of the old action on the case for intentional harm.[20] It should not call the action one of libel, because it is not true that an action of libel lies for non-defamatory words. The action of libel lies regardless of the defendant's intention to harm the plaintiff,[21] but the action for non-defamatory words is an intentional tort. If the court would admit that what it means by the term libel *per se* is the same as what most courts mean by the term "defamatory," much of the confusion would disappear.[22]

Need for an Innuendo Test

There can be found in some Ohio cases language to the effect that only words clearly defamatory on their face are to be classed

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[20] ". . . an action will lie for written or oral falsehoods, not actionable *per se* or even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage. Such an action is not one of libel or slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse . . . . To support it, actual damage must be shown for it is an action which only lies in respect of such damage as has actually occurred." Bowen, L. J., in Ratcliffe v. Evans [1892] 2 Q.B. 524. This is somewhat analogous to an action for slander of title. See Cleveland Leader Printing Co. v. Nethersole, 84 Ohio St. 118, 95 N.E. 735, Ann. Cas. 1912B 978 (1911).

[21] Petransky v. Repository Printing Co., 51 Ohio App. 306, 200 N.E. 647 (1935).

[22] A rather peculiar, and it is believed erroneous, definition of "defamatory" is found in Associated Consumers and Dealers v. Better Business Commission, 3 Ohio L. Abs. 527 (1925), where the court said, "The word defamatory means that the language must be such as by a necessary or natural proximate consequence occasions pecuniary loss to him whom it concerns." A good discussion of the nature of a defamatory meaning by Learned Hand is to be found in Grant v. Reader's Digest Ass'n., Inc., 151 F. 2d 733 (2d Cir. 1945).

as libel *per se*.[23] As stated before, this is the test most courts use in determining what is libel *per se*, the only differences being that many of those courts merely make a procedural distinction between libel *per se* and *per quod* whereas our courts claim to make one of substance. Sometimes this language has a tendency to confuse judges attempting to apply the "nature of the charge" test. A court of appeals case will illustrate this.

In *Westropp v. E. W. Scripps Co.*,[24] the plaintiff claimed she was libeled by a cartoon in the defendant's newspaper. After either including or describing the cartoon in the petition, the plaintiff by innuendo alleged the defamatory meaning of the cartoon. The court of appeals held that since plaintiff had resorted to explanation by an innuendo she admitted the ambiguity of the cartoon's meaning and that reasonable minds might differ as to its meaning. The court then stated that therefore the language was not libel *per se*. The remarkable thing is that then the court submitted the question of whether or not the cartoon was libel *per se* to the jury. After stating the cartoon was not libel *per se* they said the jury could find it was. Apparently what was meant was that the court would not say the cartoon was libelous *per se* as a matter of law. The decision really stands for the proposition that ambiguous charges may be libelous *per se* although much of the language in the opinion is to the contrary.

A more recent case, *Westropp v. E. W. Scripps Co.*,[25] involving the same parties, will illustrate the division in Ohio over which test is to be employed. The plaintiff set out the allegedly libelous article in full and then, again, resorted to an innuendo to allege its defamatory meaning. The defendant had a verdict below, affirmed by the court of appeals, and plaintiff appealed to the supreme court arguing that the trial court erred in not instructing the jury that the article was libelous *per se*. The supreme court split four and three. Two dissenting judges felt that the judgment for the defendant should be sustained on the ground that the petition merely stated a case of libel *per quod* and no special damages had been alleged or proved. They felt it was libel *per quod* because the words were ambiguous and plaintiff had resorted to an innuendo to explain their meaning. They said, "It is the duty of the court to determine whether the published words are actionable *per* se and to instruct the jury accordingly. If there is any doubt about it, that is, if the meaning is ambiguous, the publication is

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[23] Johnson v. Campbell, 91 Ohio App. 483, 108 N.E. 2d 749 (1952); Westropp v. E. W. Scripps Co., 76 Ohio App. 463, 59 N.E. 2d 205 (1944); Commercial Gazette Co. v. Grooms, 21 Wkly. L. Bull. 292 (1889); Settlage v. Kampf, 10 Ohio Dec. Repr. 822, 19 Wkly. L. Bull. 321 (1888).

[24] 76 Ohio App. 463, 59 N.E. 2d 205 (1944).

[25] 148 Ohio St. 365, 74 N.E. 2d 340 (1947).

not actionable *per se.*"[26] A majority of the court, however, felt the trial court erred in not instructing the jury that the words were libelous *per se,* not because such is never a jury question, but because the publication in the case was unequivocally libelous *per se,* and plaintiff's innuendo could be disregarded as unnecessary. The court said, "It is well settled that in an action for libel the question whether the publication complained of is libelous *per se* is primarily for the court, and that it is error to submit to the jury the question whether the publication is libelous *per se,* unless its meaning is so uncertain and ambiguous as to require that the construction and meaning be submitted to the jury."[27] The court further said that in determining whether the words are libelous *per se* reference should be made to the circumstances under which they were used. The court thereby rejected the test which looks only to the words themselves in determining whether they are libel *per se.* The third dissenting judge agreed that the question of libel *per se* can be a jury question and that since the jury returned a verdict for the defendant they evidently found the publication not libel *per se.* This judge thought that since plaintiff had used an innuendo, and thereby admitted the words were ambiguous, the question was properly submitted to the jury.

Thus it can be seen that a majority of the supreme court in 1947 applied the "nature of the charge" test and did not confine it to the face of the words. Two of the judges applied the "need for an innuendo" test, perhaps broadening it into a "use of an innuendo" test. Two of the five judges who used the "nature of the charge" test and one who used the "need for an innuendo" test are no longer on the court, and so it cannot be said with any great certainty which test will be applied in the future. One does not get the impression from reading the *Westropp* case that the question has been completely settled.

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[26] *Id.* at 380, 74 N.E. 2d at 348.

[27] *Id.* at 373, 74 N.E. 2d at 345.